Bandar Utama City Corp Sdn Bhd (formerly known as Damansara Jaya Sdn Bhd) v Director General of Inland Revenue

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO 25–27 OF 1996
LOW HOP BING J
21 MARCH 1997

Administrative Law *— Remedies — Mandamus — Application to order Director General of Inland Revenue to provide basis of computations for assessments of income tax — Whether Director General of Inland Revenue under legal duty to furnish particulars of assessments — Whether failure by applicants to specifically state s 140 of the Act in statement pursuant to O 53 r 1(2) of Rules of the High Court 1980 was fatal — Income Tax Act 1967 s 140(1) & (5) — Rules of the High Court 1980 O 53 r 1(2) & (3)*

Revenue Law *— Income Tax — Assessment — Assessments under s 140(1)(c) of the Income Tax Act 1967 — Whether Director General of Inland Revenue under legal duty to furnish particulars of assessments under s 140(5) of the Income Tax Act 1967 — Whether failure to do so breach of rules of natural justice — Income Tax Act 1967 s 140(5)*

Words and Phrases *— 'Particulars' — Income Tax Act 1967 s 140(5)*

The applicants sought leave to proceed with two substantive notices of motion for an order of mandamus directing the respondent to provide the reasons and the basis of computations for additional and ordinary assessments ('the assessments') made by the respondent pursuant to s 140(1)(c) of the Income Tax Act 1967 ('the Act') and imposed separately against the applicants over several years of assessments between 1979 and 1990. On 21 June 1996, the High Court granted the leave sought and the applicants then proceeded to file the two substantive notices of motion vide Originating Motion Nos 25–27–1996 and 25–29–1996. The applicants had earlier filed notices of appeal in Form Q ('the appeals') under s 99 of the Act to appeal against the assessments of the respondent. The applicants sought to argue that in view of the appeals, the applicants required the reasons and basis of computation which the respondent was legally bound to provide under s 140(5) of the Act as well as pursuant to the rules of natural justice. The respondent had, inter alia, alleged that the applicants had evaded or avoided liability by way of accounts irregularities and under-declaration of income and had made 'fictitious purchases' but did not provide any basis for such allegations. On the other hand, the respondent argued that under s 140(1) of the Act, he was given power to disregard certain transactions and it was not a provision for making assessments but rather adjustments as the respondent thought fit. As for the the rules of natural justice, the respondent argued that it did not apply to the circumstances of the case but would only apply at the appeals stage. At the hearing of the substantive motions, the respondent also raised

a preliminary objection that as s 140 of the Act — which was the crux of the applicants' submission — was not cited in the applicants' statement under O 53 r 1(2) of the Rules of the High Court 1980 ('the RHC') and by virtue of O 53 r 3 of the RHC, the submissions concerning s 140 of the Act were irrelevant and on this basis, the applications before the High Court must fail. The applicants contended that the nature of the applicants before the High Court was an order for mandamus to require the respondent to carry out an express statutory duty under s 140(5) of the Act, to provide the reasons and basis for the assessments.

Held, allowing the application for mandamus:

(1) Section 140(5) of the Act was relied upon by the applicants to support the two substantive notices of motion. In advancing the grounds of application, the applicants were perfectly entitled to rely on any written laws in support thereof, including s 140(5) and all judicial authorities which provided the necessary illuminations on the said provision and the fundamental rules of natural justice. The respondent's preliminary objection was devoid of merit and overruled (see pp 308I–309A, C).

(2) In order to enable the applicants to rightfully discharge the burden of disproving the assessments before the Special Commissioners, the applicants would require particulars. These particulars were crucial to the applicants to enable them to prepare the appeals against the respondent. The respondent's failure to do so would not only be a breach of its statutory duty under s 140(5) of the Act, which imposed a duty that the respondent furnish 'particulars' of the adjustments which included assessments but also a breach of the rules of natural justice (see p 310A–B); *Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd* [1985] 2 MLJ 322, *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169, *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 and *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33 followed.

Moreover, the applicants were seeking to ensure that the appeals before the Special Commissioners did not turn into an exercise in futility. The appeals would be futile if the applicants were not given particulars of the assessments, which inevitably was tantamount to allowing the respondent's default to cause manifest injustice to the applicants (see p 310B–C).

(3) Section 140(5) of the Act clearly imposed a duty on the respondent to give 'particulars' of the assessments together with the notice of assessment where there have been allegations of 'tax evasions' under s 140(1)(c) of the Act. Where the respondent was under a duty to give particulars, the applicants had a right to be furnished with such particulars. An order for mandamus does not

A determine the case once and for all but merely required the respondent to furnish the applicants with particulars in order to facilitate the appeals before the Special Commissioners (see p 314D–F); *C v Comptroller of Income Tax* [1967] 2 MLJ 137 followed.

B (4) 'Particulars', according to its popular, ordinary dictionary meaning meant point of information, a detailed account. It meant the items or details or points (see p 309B); *Royal Bank of Canada v Inland Revenue Commissioner* [1972] Ch 665 followed.

C **[Bahasa Malaysia summary**

Pemohon memohon kebenaran untuk meneruskan prosiding dengan dua notis-notis usul substantif untuk perintah mandamus mengarahkan penentang untuk memberi alasan dan asas-asas komputasi untuk taksiran biasa dan tambahan ('taksiran tersebut') D yang dibuat oleh penentang berikutan dengan s 140(1)(c) Akta Cukai Pendapatan 1967 ('Akta tersebut') yang telah dikenakan secara berasingan ke atas pemohon-pemohon dalam tempoh beberapa tahun di antara tahun 1979 dan 1990. Pada 21 Jun 1996, Mahkamah Tinggi memberi perintah seperti yang dipohon dan pemohon kemudiannya menfailkan dua notis usul substantif melalui Usul Pemula No 25–27– E 1996 dan No 25–29–1996. Sebelum itu, pemohon telah menfailkan notis-notis rayuan dalam Borang Q ('rayuan tersebut') di bawah s 99 Akta tersebut untuk merayu ke atas taksiran penentang. Pemohon berhujah bahawa, memandangkan rayuan tersebut, mereka memerlukan alasan dan asas-asas komputasi di mana penentang adalah terikat untuk memberi di sisi undang-undang di bawah F s 140(5) Akta tersebut dan di bawah rukun keadilan asasi. Penentang pula, antara lain, mengatakan bahawa pemohon telah mengelakkan liabiliti melalui akaun-akaun di luar aturan dan tidak mengisytiharkan pendapatan sepenuhnnya dan telah membuat 'pembelian palsu'. Akan tetapi, penentang tidak memberi sebarang alasan untuk tuduhan G tersebut. Sebaliknya, penentang berhujah bahawa di bawah s 140(1) Akta tersebut, beliau telah diberi kuasa untuk tidak mengambilkira beberapa transaksi dan bahawa adalah bukan suatu peruntukan untuk membuat taksiran tetapi untuk membuat pelarasan seperti mana penentang fikirkan perlu. Seterusnya, di bawah rukun keadilan asasi, penentang berhujah bahawa ia tidak terpakai ke atas situasi kes ini H tetapi sebaliknya hanya terpakai di peringkat rayuan. Semasa pendengaran usul-usul substantif tersebut, penentang membuat bantahan permulaan bahawa s 140(5) Akta tersebut — yang merupakan asas hujah pemohon — telah tidak dinamakan di dalam pernyataan pemohon di bawah A 53 k 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan berdasarkan A 53 k 3 KMT, I hujah-hujah berkenaan s 140 Akta tersebut adalah tidak relevan, dan maka dengan itu permohonan di Mahkamah Tinggi seharusnya gagal. Pemohon kemudiannya berhujah bahawa isu permohonan di

Mahkamah Tinggi adalah untuk mendapatkan perintah mandamus di mana penentang perlu melaksanakan kewajipan statutori nyata di bawah s 140(5) Akta tersebut dengan memberi alasan dan asas-asas untuk taksiran. A

Diputuskan, membenarkan permohonan perintah mandamus: B

(1) Pemohon telah menggunakan s 140(5) Akta tersebut untuk menyokong kedua-dua notis-notis usul subtantif. Dalam mengemukakan alasan-alasan permohonan, pemohon adalah berhak untuk menggunakan sebarang undang-undang bertulis, termasuk s 140(5) dan semua autoriti kehakiman yang memberi petunjuk kepada peruntukan dan rukun keadilan asasi. Bantahan pihak penentang adalah tidak bermerit dan ditolak (lihat ms 308I–309A, C). C

(2) Pemohon memerlukan butir-butir lanjut untuk membolehkan mereka melepaskan beban untuk mengakas taksiran-taksiran tersebut di hadapan Pesuruhjaya Khas. Keterangan lanjut ini adalah penting bagi pemohon untuk membolehkan mereka menyediakan rayuan terhadap penentang. Kegagalan penentang dalam hal ini adalah bukan sahaja merupakan pemecahan kewajipan statutori di bawah s 140(5) Akta tersebut, di mana penentang berkewajipan memberi 'butir-butir' pelarasan termasuk taksiran, tetapi juga merupakan pemecahan rukun keadilan asasi (lihat ms 310A–B); *Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd* [1985] 2 MLJ 322, *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169, *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 dan *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33 diikut. D E F

Tambahan pula, pemohon memohon untuk memastikan agar rayuan di hadapan Pesuruhjaya Khas tidak menjadi suatu usaha yang sia-sia. Rayuan tersebut akan menjadi sia-sia sekiranya pemohon tidak diberi butir-butir taksiran dan ini akan terjumlah sebagai membenarkan pengingkaran penentang menjadi sebab ketidakadilan ke atas pemohon (lihat ms 310B–C). G

(3) Seksyen 140(5) dengan nyatanya mengenakan tanggungjawab ke atas penentang untuk memberi 'butir-butir' taksiran bersama dengan notis taksiran sekiranya terdapat pengataaan 'pelarian cukai' di bawah s 140(5) Akta tersebut. Di mana penentang mempunyai tugas untuk memberi butir-butir, pemohon adalah berhak untuk diberi butir-butir tersebut. Perintah mandamus tidak menentukan kes tersebut dengan muktamad tetapi hanya memerlukan penentang untuk memberi butir-butir kepada pemohon untuk membolehkan mereka menyediakan rayuan di hadapan Pesuruhjaya Khas (lihat ms 314B–F); *C v Comptroller of Income Tax* [1967] 2 MLJ 137 diikut. H I

A (4) 'Butir-butir' adalah diberi maksud biasa iaitu fakta-fakta yang khusus. Ia bermaksud butiran atau detail atau perkara (lihat ms 309B); *Royal Bank of Canada v Inland Revenue Commissioner* [1972] Ch 665 diikut.]

B **Notes**

For cases on mandamus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 349–372.

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1730–1739.

C

Cases referred to

C v Comptroller of Income Tax [1967] 2 MLJ 137 (folld)

Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd [1985] 2 MLJ 322 (folld)

D *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 (refd)

R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531 (folld)

Royal Bank of Canada v Inland Revenue Commissioner [1972] Ch 665 (refd)

E *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 (folld)

UHG v Director General of Inland Revenue [1974] 2 MLJ 33 (folld)

Legislation referred to

F Income Tax Act 1967 ss 99, 140(1)(c), (5)

Rules of the High Court 1980 O 53 rr 1(2), 3

S Woodhull (*Siva Baskaran* with him) (*Shearn Delamore & Co*) for the applicant.

G *Kok Keng Fai* (*Noradidah Ahmad* with him) (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Low Hop Bing J:

H *Background*

On 21 June 1996, I granted leave pursuant to two notices of motion, viz the first by applicant Bandar Utama City Corp Sdn Bhd, to apply for an order of mandamus, in Originating Motion No 25–27–1996 ('the first application') directed to the respondent, to provide the reasons and the I basis for computations, in which the respondent had raised additional assessments for the years 1979, 1980, 1981, 1984, 1985, 1986, 1987, 1988, 1989 and 1990 for ordinary assessment; and the second, by First

Nationwide Security Sdn Bhd in Originating Motion No 25–29–1996, ('the second application') to apply for an order of mandamus, directed to the respondent, to provide the reasons and the basis for computations for imposing additional assessments for the years of assessment 1984 to 1986 inclusive and the ordinary assessment imposed for the year of assessment 1990. The respondent in the aforesaid notices of motion did not file any notice of appeal against my decision in granting the aforesaid leave. Pursuant thereto, the applicants filed the present two substantive notices of motion.

Preliminary objection

Learned counsel for the respondent raised a preliminary objection to these two substantive notices of motion. He stated that these two notices of motion are supported by a statement under O 53 r 1(2) of the Rules of the High Court 1980 dated 8 May 1996 and two affidavits affirmed by one Teo Chiang Hong on 5 April 1996 and 30 April 1996 respectively. He contended that pursuant to O 53 r 3, no grounds shall be relied upon at the hearing of the motion except the grounds set out in the statement under O 53 r 1(2). On this basis, the applicants must, perforce, rely on those grounds viz that, by failing to provide the reasons and basis for the tax computations, the respondent:

(i) did not follow proper procedure and had acted unfairly; and

(ii) has made it impossible for the applicants to have a fair hearing before the Special Commissioners to appeal against the additional assessments.

He added that s 140 of the Income Tax Act 1967 ('the Act'), which is the crux of the applicants' submissions now, was never cited in the applicants' statement and in the title to these applications. (Unless the context otherwise requires, any reference to any section hereinafter is a reference to that section in the Act). Hence, according to him, the applicants' submissions on s 140 are irrelevant and that on this ground alone, these applications should be dismissed.

Learned counsel for the applicants contended that in these two substantive notices of motion, the applicants are seeking an order of mandamus each to require the respondent to carry out an express statutory duty under s 140(5), ie to provide the reasons and basis for tax computations.

Decision of the court on the preliminary objection

The relevant portion of s 140(5) reads:

> Where in consequence of any adjustment made under this section an assessment is made ... particulars of the adjustment shall be given with the notice of assessment ... .

Section 140(5) is relied upon by the applicants to support these two substantive notices of motion. In advancing the grounds of application, the

applicants are, in my judgment, perfectly entitled to rely on any written law in support thereof, including s 140(5) and all judicial authorities which provide the necessary illuminations on the provision of s 140(5) and the fundamental rules of natural justice.

Section 140(5) sets out the legal obligations of the respondent to furnish the 'particulars'. The word 'particulars' has not been defined in the Act and so it is to be construed by reference to its popular, ordinary dictionary meaning. The word 'particulars' means 'points of information; a detailed account' (see *The Concise Oxford Dictionary* (9th Ed, 1995)). It means the items or details or points: *Royal Bank of Canada v Inland Revenue Commissioners* [1972] Ch 665. I am of the view that any submissions relating thereto is relevant and material and ought to be considered on their merits.

I therefore have no difficulty in holding that the respondent's preliminary objection is devoid of merits and is hereby overruled.

Merits on the two substantive motions

Applicants' submission

In essence, the submission advanced for the applicants is to the effect that in the light of the applicants' appeals to the Special Commissioners of Income Tax ('the Special Commissioners'), the applicants required the reasons and the basis which the respondent is legally bound to provide to the applicants under s 140(5) and also pursuant to the rules of natural justice.

Respondent's submission

The respondent, on the other hand, is of the view that s 140 is a power given to the respondent to disregard certain transactions, and not a provision for making an assessment but for making adjustments as the respondent thinks fit, with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

On the fundamental rules of natural justice, in particular, audi alteram partem (hear the other side), learned counsel for the respondent contended that it had no application in relation to the respondent in the circumstances of this case, although he conceded that the maxim would apply before the Special Commissioners.

Decision of the court

Statutory duty under s 140

In the instant case, the applicants have filed notices of appeal ('the appeals') in Form Q under s 99 to appeal to the Special Commissioners against the abovesaid additional and ordinary assessments ('the assessments').

Before the Special Commissioners, the applicants will have to discharge the burden of proof placed upon them, by para 13 of Sch 5 which provides:

> The onus of proving that an assessment against which an appeal is made is excessive or erroneous is on the appellant.

In order to enable the applicants rightfully to discharge the burden of disproving the assessments, the applicants require particulars thereof. These particulars are crucial to the applicants to enable them to prepare their appeals against the respondent. The respondent's failure to provide these particulars to the applicants would not only be a breach of its statutory duty under s 140(5) but also a breach of the rules of natural justice, if not an outright denial of justice itself.

The applicants are seeking to ensure that the hearing of its appeals before the Special Commissioners does not turn out to be an exercise in futility. The appeals would be futile if the applicants are not given the particulars of the said additional assessments, which inevitably is tantamount to allowing the respondent's default to cause manifest injustice to the applicants.

The assessments were raised by the respondent against the applicants under s 140(1)(c) purportedly on the grounds that the applicants have evaded or avoided liability which would otherwise have been imposed under the Act and has raised the assessments by way of an adjustment under s 140. Of particular importance is s 140(1)(c) which reads:

> The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —
>
> (c) *evading or avoiding any duty or liability which is imposed or would otherwise have been imposed* on any person by this Act; or
>
> ...
>
> may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make *such adjustments as he thinks fit* with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction. (Emphasis added.)

The word 'adjustment' has been judicially considered by Raja Azlan Shah FJ (now HRH) in *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33 where it was stated that (at p 35):

> To carry out these adjustments, he may make such assessments or additional assessments as he deems necessary ... .

It is eminently clear that an adjustment would necessarily and inevitably encompass an additional assessment or an ordinary assessment. Hence, where an assessment has been raised under s 140 in general and s 140(1)(c) in particular, the law imposes a duty on the respondent to furnish the applicants with 'particulars' of the adjustment which as stated above includes 'assessment'. In addition, the respondent is also required by the rules of natural justice to give notice and make an adequate disclosure of the particulars of the adjustment against the applicants in order to give the applicant a reasonable opportunity to set out its case and appeal against the assessments.

A The respondent alleged that the applicant has evaded or avoided liability which would otherwise have been imposed under the Act, by way of account irregularities and underdeclaration of income (see the respondent's letter dated 17 December 1993 (exh 'TCH-2'), specifically addressed to Dato' Teo Soo Cheng, a director of the applicant company). The relevant passage in exh TCH–2 states as follows:

B

> Syarikat Dato' telah didapati *melakukan penyelewengan-penyelewengan akaun* bagi tempoh tersebut di atas. Ringkasan penyelewengan ini bersama keuntungan yang belum ditaksirkan disertakan untuk perhatian Dato'. (Emphasis added.)

Translation:

C

> Dato's company has been found to have *committed account irregularities* for the above period. A summary of these irregularities together with the unassessed profit is attached for your attention. (Emphasis added.)

The applicants' request to stand-over the payment of additional tax was refused and immediate payment was required by the respondent.

D The above allegations are of a very serious nature as they relate to account irregularities and underdeclaration, or in general terms 'tax evasion'.

In my judgment, s 140(5) imposes a duty on the respondent to give 'particulars' of the adjustments which include assessments.

The respondent's statutory duty under s 140(5) was judicially E enunciated by the (then) Supreme Court in *Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd* [1985] 2 MLJ 322 at pp 326–327 where Wan Hamzah SCJ examined s 140 at length and concluded at p 327H–I that:

F

> If from evidence the Revenue was satisfied that the transaction whereby the taxpayer paid the sum of $1.4m to the Persatuan was a transaction made for the purpose of evading or avoiding liability to pay income tax, the Revenue should take action pursuant to s 140 to make adjustment with a view to counter-acting the effect of the transaction, *and in that event the Revenue should under sub-s (5), give to the taxpayer particulars of the adjustment together with the notice of assessment.* (Emphasis added.)

G In *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 at p 255H–I, Lee Hun Hoe CJ (Borneo) said, obiter, that if the Director General wishes to invoke his power under s 140, then s 140(5) requires that particulars of the assessment shall be given with the notice of assessment.

H The respondent before me had made allegations, against the applicants, of 'fictitious purchases' but had not provided any basis for saying they were 'fictitious'. It is apparent, on the facts of this case and the state of the law in regard to additional assessments raised under s 140(1)(c), that the respondent is under a statutory duty to provide the applicant with the 'reasons and basis of computations', or in other words 'particulars' of the I said additional assessments of income tax. The statutory duty imposed upon the respondent under s 140(5) is consistent with the fundamental rules of natural justice, in particular the audi alteram partem rule.

Fundamental rules of natural justice

The applicants have the right to know the nature of the case against them. *Bennion on Statutory Interpretation* (1984, Butterworths) at pp 762–163 says:

> Unless the contrary intention appears, an enactment by implication imports the principle of the maxim audi alteram partem (hear the other side) ... .
>
> Inform the party of the case he has to meet. It is obvious that a party cannot have a reasonable opportunity to be heard unless he is made aware of what it is that he is being heard about. As Lord Fraser of Tullybelton said:
>
> 'One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit.'

Hence, over and above the imperative and peremptory provisions of s 140(5), the principles of statutory interpretation necessarily imply that the rules of natural justice must be observed when dealing with the rights of individuals and, in this case, the taxpayers. Without the respondent forwarding the particulars by way of the reasons and the basis of computations for the said additional assessments, this cardinal principle of natural justice had been violated by the respondent.

In this context, the judgment of Lord Denning in the Privy Council case of *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 at pp 172I–173B is also instructive:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 at p 182; 27 TLR 378 (HL) down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC).

Lord Denning's judgment was affirmed by the House of Lords, principally in the judgment of Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at p 563E–H:

> It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v Government of Malaya* [1962] AC 322 at p 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed.

Lord Mustill refers to the right of an accused person to know the case against him as a principle of 'common sense' which requires an 'explicit disclosure ...' of the case against him. A fortiori, in the case before me, as a matter of common sense, the applicants have a right to be furnished with the particulars of the case against them, and not just allegations of the same.

The principle enunciated in cases like *Kanda*'s case and *Ex p Doody* are also reflected in the following practitioners' textbooks which are of the highest repute:

(a) De Smith, Woolf and Jowell on *Judicial Review of Administrative Action* (5th Ed) pp 431–444, in particular p 441 which states:

> If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests, he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances, there will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case.

(b) MP Jain's *Administrative Law of Malaysia and Singapore* (2nd Ed) pp 269–280 and in particular at p 269 which reads:

> The general principle is that all the relevant material which is being relied upon by an adjudicating authority for giving its decision against a person, should be brought to his notice and he be given an opportunity to comment, criticise, explain or rebut the same. For the right of hearing to be effective, it is necessary that the authority should not rely on any material against a person without apprising him of the same. The right of hearing may be of little value if the individual is kept in the dark as to the evidence against him and is not given an opportunity to deal with it. The right to know the materials on which the authority is going to take a decision forms part of the right to defend. If without disclosing any evidence to the party, the authority takes it into consideration, and decides the matter against the party, then the decision is vitiated for it amounts to a denial of a real and effective opportunity to the party to meet the case against him.

(c) MP Jain and SN Jain on *Principles of Administrative Law* (4th Ed) pp 247–253 and in particular at p 247 which contains the following passage:

> The general principle is that an adjudicatory body is to decide the matter on the basis of materials placed before it in the course of proceedings. It cannot take extraneous matters into consideration; it cannot base its decision on any material unless the person against whom it is sought to be utilized has been given an opportunity to rebut or to explain the same.
>
> If the adjudicator is going to rely on any material, evidence or document for basing his decision against the individual, then the same must be placed before him for his comments and rebuttal. It is regarded as a fundamental principle of natural justice that no materials should be relied on against a party without giving him an opportunity of explaining the same. The right to know the materials on which the authority is going to make a decision is a part of the right to defend oneself. The principle can be seen operating in several judicial pronouncements where non-disclosure of the evidence to the affected party has been held to be fatal to the hearing proceedings.

Mandamus in tax cases

In *C v Comptroller of Income Tax* [1967] 2 MLJ 137, it was held that mandamus will lie against the comptroller if he is under a statutory obligation to perform a duty towards the taxpayer. In the circumstances of this case, there was such a duty imposed upon the comptroller and mandamus was the only effective and expeditious remedy open to the taxpayer — therefore an order of mandamus was issued directed to the comptroller compelling him to comply with the provisions of s 93(3) of the then Income Tax Ordinance by causing repayment to be made to the taxpayer of the sum of $5,573.45 being income tax paid by the taxpayer in excess of the amount payable by him. Delivering the decision of the then Federal Court, Buttrose J said at p 140D:

> The comptroller has been entrusted by the Legislature with wide and far reaching powers, no doubt with very good reason, but it is of paramount importance that they should be exercised with circumspection and within the limits prescribed. If there has been an abuse of these powers, it is the duty of the court to interfere and to ensure a strict and proper compliance with the provisions of the Ordinance.

Conclusion

In my view, s 140(5) clearly imposes a duty on the respondent to give 'particulars' of the assessment together with the notice of assessment where there have been allegations of 'tax evasion' under s 140(1)(c). Where the respondent is under a duty to give particulars, the applicant has a correlative right to be furnished with such particulars. An order of mandamus does not determine the case once and for all, but merely requires the respondent to furnish the applicants with the particulars of the assessments made by the respondent in order to facilitate an appeal by the applicants to the Special Commissioners.

On the foregoing grounds, I allow both the substantive motions and make an order in terms in respect of all the additional assessments, and with costs to the applicants.

Application allowed.

Reported by Lew Chee Seong